

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNION DEL PUEBLO
ENTERO, ET AL,

PLAINTIFFS,

vs.

GREGORY W. ABBOTT, ET AL,

DEFENDANTS.

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DOCKET NO. 5:21-CV-844-XR

TRANSCRIPT OF MOTION TO COMPEL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
FEBRUARY 16, 2023

APPEARANCES:

FOR THE PLAINTIFF:
OCA

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1 REPORTED BY: GIGI SIMCOX, RMR, CRR
2 OFFICIAL COURT REPORTER
3 UNITED STATES DISTRICT COURT
4 SAN ANTONIO, TEXAS
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1 (San Antonio, Texas; February 16, 2023, at 2:00 p.m., in
2 open court.)

3 THE COURT: LUPE versus Texas, 21 civil 844.

4 MR. NICHOLS: Good afternoon, Judge.

5 THE COURT: Afternoon.

6 Might we announce names for the record.

7 MR. DOLLING: This is Zack Dolling on behalf of the
8 OCA plaintiffs.

9 MR. NICHOLS: And Eric Nichols here on behalf of
10 defendant Harris County District Attorney, as well as the
11 respondent on the motion to compel.

12 THE DEPUTY CLERK: It's on the docket for 2:30, so
13 hopefully everybody that is speaking is here online or in
14 court. I'm not sure.

15 THE COURT: So I'm being told I'm starting half an
16 hour early. Are we expecting more people here or not?

17 MR. NICHOLS: I think they filed a motion to compel.
18 I'm answering it. So I think we're here.

19 THE COURT: So we have everybody we need?

20 MR. NICHOLS: I think so.

21 THE COURT: Okay. So where to go with this.

22 So by now I think everybody knows me. I look at big
23 pictures and I try to figure out, instead of going into
24 minutia, what are we trying to do. So with regard to the
25 discovery request being sent to District Attorney Ogg, big

1 picture, what are you trying to get from her and her office,
2 and why?

3 MR. DOLLING: We're trying to get any evidence that
4 would go to show that --

5 THE COURT: Pull the mike just a little closer to
6 you. Thanks. And you might want to make sure it's on.

7 MR. DOLLING: We are just trying to get any evidence
8 that exists that would go to demonstrate that defendant Ogg
9 poses a credible threat of prosecution with respect to the
10 provisions of SB 1 that we are challenging and that we believe
11 case law supports would include past prosecutions or
12 investigations, or potentially ongoing prosecutions or
13 investigations of both alleged defenses under those provisions
14 as well as similar provisions, similar criminal provisions.

15 And we also believe that that evidence would go to
16 show a demonstrated willingness to enforce the provisions that
17 we have challenged with respect to the Ex Parte Young
18 doctrine.

19 THE COURT: And so I don't know anything about
20 District Attorney Ogg. How long has she been in office?

21 MR. DOLLING: I believe since 2017, Your Honor.

22 THE COURT: And so your request for production, how
23 far back were you going?

24 MR. DOLLING: We requested for January 1st, 2016 to
25 the present day.

1 THE COURT: So she wasn't the district attorney.

2 MR. DOLLING: That's correct, Your Honor.

3 THE COURT: Yeah, so that's problem number one --
4 right? -- because, you know, we're looking at her willingness
5 or desirability to prosecute, right?

6 So did she take office January 1, 2017?

7 MR. DOLLING: I'm not entirely sure, Your Honor, but
8 it was after the time period we began with.

9 THE COURT: Do you know the answer to that?

10 MR. NICHOLS: I should know off the top of my head.
11 I'm looking it up right now, Judge.

12 THE COURT: Okay. So let's just assume it was
13 January 1, 2017 until I'm told differently.

14 We probably, if we're going -- I'm not making any
15 rulings. I just want to figure out just how this would all
16 work.

17 When we would be talking about prosecutions, or --
18 well, now, when you are asking for stuff are you asking for
19 like actual indictments, or are you just looking for -- are
20 you also including investigations that did not lead to an
21 indictment? What are you looking for?

22 MR. DOLLING: We did include investigations that
23 didn't lead to an indictment. Essentially all investigations
24 or prosec -- I believe it was phrased "investigations or
25 prosecutions of violations or suspected violations," of what

1 we defined as criminal election law.

2 THE COURT: And so we're challenging in this lawsuit
3 just SB 1, so is that a problem that, you know, SB 1 didn't
4 get enacted into -- I ought to know this.

5 What's the effective date of SB 1?

6 MR. DOLLING: I believe it's December 2021.

7 THE COURT: So with regard to stuff that might have
8 happened from 2017 to November of 2021, why do you think that
9 that is relevant to this case and the allegations that you're
10 seeking about enforcement of SB 1?

11 MR. DOLLING: Well, I believe that the case law we
12 cited in our motion supports the idea that the prosecution and
13 investigation of similar crimes regulating similar election-
14 or voting-related conduct is relevant to showing a threat of
15 prosecution for these newer provisions.

16 THE COURT: And so with regard to relevance, though,
17 so let's talk hypothetically. Let's say that there was
18 somebody between 2017 and 2021 that was investigated for and
19 indicted for actually paying, bribing people to vote. I mean,
20 why would that be relevant to anything in this lawsuit that we
21 have right now?

22 MR. DOLLING: I suppose for the same reason that I
23 just stated, Your Honor. I believe that that would show
24 defendant Ogg's willingness to prosecute crimes that were
25 within the same realm as voting-related conduct, is what we

1 are -- as the provisions of SB 1 regulate that we challenged
2 here.

3 And also this is, again, sort of speculative because
4 we have no answers or documents to go off of, but potentially
5 one could imagine that investigations that pre-dated SB 1
6 could lead to prosecutions under SB 1, once SB 1 goes into
7 effect.

8 THE COURT: So, Mr. Nichols, so the Fifth Circuit
9 already has sort of rejected the sovereign immunity argument,
10 so what's your next back-up position?

11 MR. NICHOLS: Well, first, let me answer the Court's
12 question. So they were correct, that District Attorney Ogg
13 was elected in the 2016 election, took office, as you said,
14 January 1st, 2017, and she was re-elected in 2020 for a second
15 term.

16 The sovereign immunity issue is still very much alive
17 at the Fifth Circuit.

18 THE COURT: Well --

19 MR. NICHOLS: What happened --

20 THE COURT: It wasn't good enough to make it past --
21 was it Higginbotham? I can't remember who said you weren't
22 going to get there.

23 MR. NICHOLS: No, I think that what the Court is
24 referring to is that we did seek a stay pending the appeal of
25 the discovery at issue. And that, if that's what the Court is

1 referring to, the Court is 100 percent correct. That
2 position, that request for a stay was rejected, but the reason
3 why it was rejected was not because the Fifth Circuit decided
4 the sovereign immunity issue.

5 It issued a ruling basically saying that you can't
6 show irreparable harm from the discovery that is pending, or
7 any proceedings before this honorable district court regarding
8 that matter, and they also pointed out a very interesting
9 issue, which, as the Court knows, is still pending out there
10 too, which is that the plaintiffs in the case have made not
11 only 1983 claims but they've also made claims under federal
12 statutes including the Voting Rights Act that include, as the
13 Court is well aware, a waiver of sovereign immunity as part of
14 the statute.

15 And so that's the ruling that the Fifth Circuit has
16 made, but the underlying appeal that relates to this very
17 important issue and very interesting issue of whether a
18 Section 1983 claim can be made against someone like my client
19 who has not — there's no evidence was involved in creating SB
20 1, there's no evidence to suggest that she spoke in favor of
21 it, there's no evidence to suggest that she's ever prosecuted
22 anyone, as the Court suggested earlier in asking questions to
23 the plaintiffs, under any provision of SB 1, whether her mere
24 status as the elected district attorney in Harris County is
25 enough to shoehorn into the Ex Parte Young exception to

1 sovereign immunity.

2 It's a fascinating issue. The Court has made a
3 ruling on that and we fully appreciate and respect the Court's
4 ruling, but I did want to just get the Court up to speed on
5 kind of where that sovereign immunity issue is.

6 THE COURT: So I'm reading from the bottom of page 4,
7 top of page 5 on the Fifth Circuit's denial. "Ogg has no
8 likelihood of succeeding on the merits of a sovereign immunity
9 defense and she suffers no irreparable harm when we deny her
10 sovereign immunity protections," so that's what I read.

11 MR. NICHOLS: Judge, I'll look at the opinion -- I
12 mean --

13 THE COURT: It's the very last sentence of page 4,
14 top of page 5.

15 MR. NICHOLS: No, it's concerning the VRA claims,
16 Judge. You have to go -- I'm sorry, Judge, I apologize.

17 THE COURT: So you are saying 1983, the Court didn't
18 address that?

19 MR. NICHOLS: Correct. And that's the really
20 interesting issue, Judge.

21 THE COURT: But why wouldn't they have said that?

22 MR. NICHOLS: Because so that --

23 THE COURT: That would be the easiest way to stay
24 discovery -- right? -- if they had said it.

25 MR. NICHOLS: No, but the point is, this is the

1 interesting part of this whole big picture like you're talking
2 about.

3 So if this were a straight 1983 case I believe that
4 the Fifth Circuit may very well come out a different way.
5 They would have said, you know, we are going to look at the
6 sovereign immunity issue, we're going to stay it.

7 But what the plaintiffs did in this case, and it's a
8 very interesting thing that's happening, and I don't know if
9 you've seen this in other cases or not, but it's a very
10 interesting thing that's happening is, so plaintiffs who would
11 normally just make a 1983 claim are adding to their claims,
12 their complaints, claims under statutes that carry with them a
13 waiver of sovereign immunity.

14 Even if they are not prepared, and we respectfully
15 suggest they are not here, to make specific allegations that
16 my client, for example, visited any injury on any one of the
17 Voting Rights Act, or that any injury that the plaintiffs are
18 claiming could be tracked under *Lujan* back to my client.

19 And so the basis for the Fifth Circuit's denial of
20 the stay was in recognition of this new strategy. We don't
21 think the strategy is sound, but that's where the Fifth
22 Circuit came out.

23 And in my respectful view is that because they have
24 alleged not only a 1983 claim, but also a VRA claim, Voting
25 Rights Act claim, then you can't meet the standard for a stay

1 of the discovery pending your underlying appeal.

2 THE COURT: So I'm trying to -- I mean, so if your
3 client is claiming that she's an improper party because she
4 hasn't done anything, isn't the easiest way just saying,
5 answer interrogatory saying that from January 1, 2017 up to
6 the present I have never investigated, prosecuted, or indicted
7 anyone for an election offense? And so she answers that way
8 and that makes everything else moot.

9 MR. NICHOLS: And, Judge, last night at 11:00,
10 11:00 p.m., you haven't seen this, it's not part of the record
11 before you --

12 THE COURT: That seems to be happening a lot today.

13 MR. NICHOLS: I know, but I received some additional
14 discovery from other plaintiffs, other than the OAC
15 plaintiffs, and they must have been reading your mind because
16 they sent an interrogatory basically along the lines of what
17 the Court just said.

18 So I have not had a chance to really digest this
19 since I got it at 11:00 last night. Certainly need to talk to
20 my client about it, but this is a different type of request
21 than what we are talking about today, which as the Court
22 understands from the questions you asked, involves going
23 through the DA's files and pulling investigations and things
24 like that. It's a very, very different thing.

25 And maybe there is a different way of skinning this

1 cat, so to speak, and maybe we get there, but I think this
2 11:00 p.m. last-night discovery is a lot closer to what the
3 Court is suggesting.

4 THE COURT: So everything I do in all these cases
5 gets appealed, so I'm trying to go with the path of least
6 resistance right now.

7 So apparently you have sent this interrogatory. Why
8 shouldn't we just wait to see if the answer is yes or no? If
9 the answer is no, I haven't done anything since I took office
10 in 2017, that makes all this moot.

11 Now, if the answer is yes, let's now figure out how
12 we tackle this. If the answer is yes, rather than all the
13 documents and all this other stuff, don't you need to -- just
14 like a couple of lines saying -- and now I could see also two
15 issues being raised.

16 Let's say it was an investigation but not an
17 indictment, so there's always privacy concerns about district
18 attorneys potentially violating people's due process rights,
19 and so but what's wrong with just then, if the answer is yes,
20 she says -- okay, let's just take a hypothetical -- we have
21 had ten instances. I'm just making up numbers.

22 Instance number one was for blah. It was an
23 investigation of X-Y-Z. We don't identify the person's name
24 so we don't get into these due process issues out there, and
25 then the result was inconclusive and investigation dismissed,

1 whatever. And then on to two, on to three, on to four.

2 Why doesn't that get you what you need?

3 MR. DOLLING: I believe that would get us what we
4 need, Your Honor. We would be satisfied with statements as to
5 the existence and subject matter of investigations and
6 prosecutions.

7 We're not interested in personally identifying
8 information or any sort of work product or attorney-client
9 privilege information. I think that we've made that pretty
10 clear in our negotiations with opposing counsel and in our
11 briefing.

12 And with regard to the requests that were sent last
13 night, we were not -- I'm not aware of what they asked for
14 myself, but if that is what is at issue then I think that
15 the --

16 THE COURT: Oh, I'm sorry. So I thought those were
17 yours. This is OCA's?

18 MR. NICHOLS: They are OCA. The ones that came in
19 last night were from LULAC, the LULAC plaintiffs.

20 THE COURT: Okay.

21 MR. DOLLING: But the Court's sort of plan that you
22 have outlined makes sense to me. The only snag, I would say,
23 is that we are coming up very quickly on the dispositive
24 motions deadline and so if we took action like that it would
25 probably need to be on some sort of fairly expedited time

1 line.

2 THE COURT: Yeah. So now if -- let's just assume
3 hypothetically Ogg's office has done something from January 1,
4 2017 to the present, isn't my suggestion of just these
5 answering interrogatory number, not even producing any
6 documents, just answer an interrogatory where you list one
7 through ten in my hypothetical, doesn't that cure all your
8 burdensome and all the other arguments that you were raising?

9 MR. NICHOLS: Absolutely. It goes a long, long way.

10 Little bit of the devil in details in terms of the
11 scope of what criminal law prosecutions or violations we are
12 talking about. We have had some healthy discussions between
13 counsel about that and I think we can continue those.

14 As a matter of fact, we submitted a declaration from
15 somebody at the DA's office that I think starts down the path
16 of what you're suggesting, so I think we've already got a head
17 start on it.

18 THE COURT: So on scope, I mean, you have to have a
19 statute that you're investigating somebody for and charge.

20 MR. NICHOLS: Sure.

21 THE COURT: So I mean, that ought to be limiting
22 right there.

23 MR. NICHOLS: I think so, Judge. And if we could
24 limit it to the statutes that were amended by SB 1, that would
25 be one thing. I'm not sure that -- I don't want to speak for

1 them.

2 THE COURT: Why is that not -- why isn't SB 1 and any
3 statutes that were amended by SB 1 the proper scope?

4 MR. NICHOLS: I think it is.

5 THE COURT: That's a question for him.

6 MR. NICHOLS: Oh, sorry.

7 THE COURT: Yeah.

8 MR. DOLLING: That is what we asked for.

9 MR. NICHOLS: Okay. It's always good to get in front
10 of the Court because sometimes there may be telephone game
11 loss of meaning but I think you've helped resolve that.

12 THE COURT: So I'm envisioning right now just an
13 interrogatory. No requests for production. If later you
14 think you need the actual documents we'll take that up, but
15 I'm thinking it's just an interrogatory. It's January 1, 2017
16 to the present. It's talking about investigations of SB 1 or
17 any statutes that were amended by SB 1.

18 I'm going to let you-all continue to talk, but if I
19 have to make that an order you-all know that that's going to
20 be the order.

21 MR. NICHOLS: You've been very clear, Judge. I get
22 it.

23 THE COURT: Okay. Anything else we need to take up
24 here in any of the other discovery disputes?

25 So were you asking for communications between Ogg and

1 the AG or other office holders, is that still an issue or not?

2 MR. DOLLING: I think that we -- I think that -- I
3 believe that we would be entitled to those as relevant for the
4 reasons I expressed earlier but I understand if the Court
5 might disagree with that.

6 THE COURT: Well, actually, I'm not in disagreement
7 with that. If you think you need those, I mean --

8 MR. DOLLING: I think that --

9 THE COURT: I mean, let's just assume hypothetically,
10 because I don't know what's out there. Let's just say
11 hypothetically Ogg is sending a letter to Paxton saying, I'm
12 going to lay low for now, but rest-assured I'm going to
13 prosecute these things. Why isn't that relevant?

14 MR. NICHOLS: It might be relevant, but it's not --
15 it doesn't exist. But I'm happy, if the Court wants me to
16 check and see if anything like that exists, I'm happy to do
17 it.

18 THE COURT: So I think that's what was requested.

19 So, you know, a lot of times we fight about these
20 things, and it's like we don't have to fight about it if the
21 answer is just "No."

22 MR. DOLLING: I just wanted to highlight that
23 apparently the answer to many of our interrogatories is that
24 the documents or the communications we've requested do not
25 exist, and it doesn't make sense as to why that can't just be

1 the answer.

2 THE COURT: Because we have a lot of lawyers in this
3 case who have to make a lot of theoretical arguments.

4 MR. NICHOLS: But there is one important distinction
5 and I don't want to lose it, and I think you understand from
6 what I said earlier what that is, is that this is a matter, if
7 you recall, where as in other litigation we came forward
8 proactively after my client was added administratively in the
9 litigation.

10 We came proactively with a proposal that we enter
11 into a stipulation, like we've done in other cases within the
12 federal courts, within this judicial district that basically
13 says that we will not prosecute anything pending the
14 consideration of these matters by a federal judge.

15 And for whatever reason, it didn't work for the
16 plaintiffs in this case. I don't want to get into legislating
17 why or questioning why, but I want to make sure that you
18 understand that this is a situation where we have, from the
19 get-go, tried to do what we could to avoid me having to take
20 up your time in talking about these discovery matters.

21 And with the plaintiffs pushing on these issues,
22 that's where we get to. And as a lawyer, as a professional, I
23 have zero reticence about saying how interesting these issues
24 are.

25 The issue that is coming up because of the

1 plaintiff's position is fascinating, and it's going to be a
2 new -- I don't know if you want to call it a wrinkle or a new
3 stage I think of jurisprudence in the sovereign immunity
4 space.

5 THE COURT: So I agree with all of that but I will
6 say this. This will actually make your task go to present
7 because apparently you've already made a commitment that
8 you're not going to prosecute so the time frame is even less,
9 so that ought to take the burdensome argument out.

10 But from the plaintiff's perspective and a public
11 policy perspective we have got everybody playing this game of,
12 oh, well, I, the AG's office, doesn't enforce any of this.
13 This all goes down to the local district attorneys. And the
14 local district attorneys will -- and so we've got a statute
15 here where no one -- everybody seems to be the proud father
16 for political purposes but no one wants to be the actual
17 guardian responsible for any liability or litigation purposes.

18 MR. NICHOLS: And, Judge, I can tell you, there is no
19 evidence and I don't think the plaintiffs would say there is
20 any that my client is either the father, or the mother, or the
21 Godmother of any of this.

22 And that's why I want to make the point that we're
23 trying to minimize our involvement because we know how busy
24 the Court is and we appreciate the Court's time on these
25 matters.

1 THE COURT: Any other issues we need to tackle while
2 we are here?

3 MR. DOLLING: I don't think so, Your Honor. I would
4 just respectfully disagree with opposing counsel's
5 characterization of the --

6 THE COURT: Stipulation?

7 So I always try to -- I always look forward. I don't
8 look back. I don't want to keep hearing about the fights in
9 the past. I just want to clean up and move forward.

10 I think we have cleaned up and moved forward.

11 MR. DOLLING: So if you don't mind me just clarifying
12 what the final decision is. Send an interrogatory for
13 January 2017 onward for investigations and prosecutions of SB
14 1 provisions and the statutory provisions -- or statutory
15 sections that were amended by SB 1, and we are also permitted
16 to continue to seek communications with various entities
17 related to those same sort of SB 1 provisions and statutory
18 amendments?

19 THE COURT: Concerning enforcement, yes, that's
20 correct.

21 MR. DOLLING: Okay. Thank you.

22 THE COURT: Okay. I'm sure I'll see you-all back.
23 Hopefully not in a discovery fight but something else.

24 MR. DOLLING: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. NICHOLS: Thank you, Your Honor.

2 *(Concludes proceedings)*

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4 I certify that the foregoing is a correct transcript from
5 the record of proceedings in the above-entitled matter. I
6 further certify that the transcript fees and format comply
7 with those prescribed by the Court and the Judicial Conference
8 of the United States.

9
10 Date: 02/17/23

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